Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-326

In the Supreme Court of the United States

OCTOBER TERM, 1995

J & T COAL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner's conviction and sentencing for criminal violations of federal mine safety standards after petitioner had been assessed civil sanctions for violations of the same standards.

2. Whether the district court made findings adequate to support its determination that petitioner had the ability to pay a fine.

3. Whether the district court correctly declined to "group" petitioner's offenses under Sentencing Guidelines § 3D1.2.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Austin v. *United States*, 113 S. Ct. 2801 (1993)	10
Blockburger v. *United States*, 284 U.S. 299 (1932)	5
Braxton v. *United States*, 500 U.S. 344 (1991)	13
Brown v. *Ohio*, 432 U.S. 161 (1977)	10
Jones v. *Thomas*, 491 U.S. 376 (1989)	8
Morris v. *Mathews*, 475 U.S. 237 (1986)	8
Ohio v. *Johnson*, 467 U.S. 493 (1984)	8
United States v. *Barnette*, 10 F.3d 1553 (11th Cir.), cert. denied, 115 S. Ct. 74 (1994)	8
United States v. *Dixon*, 113 S. Ct. 2849 (1993)	10
United States v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), petition for cert. pending, No. 95-346	10
United States v. *Furlett*, 974 F.2d 839 (7th Cir. 1992)	8-9
United States v. *Gomez*, 24 F.3d 924 (7th Cir.), cert. denied, 115 S. Ct. 280 (1994)	12
United States v. *Halper*, 490 U.S. 435 (1989)	3, 6, 7, 8
United States v. *Hudson*, 14 F.3d 536 (10th Cir. 1994)	10
United States v. *Williams*, 504 U.S. 36 (1992)	13

Constitution, statutes, regulations and rule:

U.S. Const.:	
Amend. V (Double Jeopardy Clause)	3, 5, 6, 7, 8
Amend. VIII (Excessive Fines Clause)	10

Statutes, regulations and rule—Continued: Page

18 U.S.C. 3553(b) 4
21 U.S.C. 881(a)(6) 10
30 U.S.C. 820(a) (Supp. V 1993) 2, 3, 5
30 U.S.C. 820(d) 2, 4, 5
30 C.F.R. 75.202(b) 2
Sentencing Guidelines:
§ 2A 4
§ 2A1.4 ..... 4, 13
§ 2X5.1 4
§ 3D1.2 ..... 4, 5, 13
§ 3D1.4 4
§ 8C3.4 12
Fed. R. Crim. P.:
Rule 32 ..... 11, 12
Rule 32(c)(1) 11

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-326

J & T COAL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is unpublished, but the judgment is noted at 56 F.3d 63 (Table). The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. A15-A22) is reported at 818 F. Supp. 925.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1995. The petition for a writ of certiorari was filed on August 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on six counts of willfully violating federal mine safety standards, in violation of 30 U.S.C. 820(d) and 30 C.F.R. 75.202(b). Petitioner was fined $1,078,713. The court of appeals affirmed. Pet. App. A1-A14.

1. On February 13, 1991, the roof collapsed in a coal mine operated by petitioner, killing four miners. Pet. App. A3-A4; see Gov't C.A. Br. 6-7. Evidence at trial established that the roof collapse followed several days in which petitioner's employees committed knowing and willful violations of federal mine safety standards. Pet. App. A3.

Petitioner was incorporated by Carl McAfee and Aubra Paul Dean in Virginia in 1980 with $1,000 of capital in the form of a loan receivable. Petitioner leased all of its equipment from, and sold all of its coal to, JAD Coal, another corporation owned largely by McAfee and Dean, although petitioner's books showed no lease expenses paid to or accounts receivable from JAD Coal. In 1990, after ten years of mining, petitioner's retained earnings were $664. Pet. App. A4; Gov't C.A. Br. 7-8.

2. After an investigation of the roof collapse by the federal Mine Safety and Health Administration and the Virginia Department of Mines, Minerals and Energy, the Federal Mines Safety and Health Review Commission assessed $300,000 in civil sanctions against petitioner pursuant to 30 U.S.C. 820(a) (Supp. V 1993). On April 6, 1992, an administrative law judge entered a default decision requiring petitioner to pay the assessment. Petitioner failed to pay the

assessment, and on July 20, 1992, the United States initiated a civil action to collect the assessment. On February 4, 1993, the district court entered judgment for the United States in that action. As of the date of the court of appeals' decision, petitioner had not paid the bulk of the assessment or satisfied the judgment. Pet. App. A2; Gov't C.A. Br. 2.

3. Before trial on the criminal charges, petitioner moved to dismiss the indictment, alleging that the Double Jeopardy Clause barred its conviction and sentencing on criminal charges resting on the mine collapse after the assessment of civil penalties in connection with the same incident. The district court denied the motion. Pet. App. A15-A22. It found no evidence that Congress intended sanctions under 30 U.S.C. 820(a) to serve a retributive or deterrent purpose and concluded that "civil penalties under § 820(a) may just as easily be said to promote the remedial goals of mine safety and reimbursement for the government's expenditures in connection with the underlying acts." Pet. App. A21 (citation omitted). In addition, the court noted that the government had shown that its costs in investigating the mine accident and pursuing sanctions amounted to at least $163,729, and it found that the assessment of $300,000 "'approximate[d] the Government's damages and actual costs.'" *Ibid.* (quoting *United States* v. *Halper*, 490 U.S. 435, 446 (1989)). The court accordingly concluded that the civil sanction imposed by federal mining authorities did not constitute "punishment" and that petitioner's conviction and sentencing on the indictment would not constitute a second punishment for the same offense, in violation of the Double Jeopardy Clause.

Petitioner was convicted. At sentencing, the district court determined that there was no sentencing guideline applicable to violations of 30 U.S.C. 820(d). The court found, however, that petitioner's offenses resulted in four counts of involuntary manslaughter. Pursuant to 18 U.S.C. 3553(b) and § 2X5.1, United States Sentencing Commission, *Guidelines Manual* (Guidelines), it therefore selected Guidelines § 2A1.4, the guideline for that offense, as the most analogous guideline. Pet. App. A10-A11. Using that guideline, the court found that petitioner's actions were reckless and set its offense level at 14. Under Guidelines § 3D1.2, a court is required to "group" offenses involving "substantially the same harm." Offenses that are grouped have a lower aggregate offense level than offenses that are not grouped. See Guidelines § 3D1.4. Guidelines § 3D1.2 provides, however, a court may not group offenses falling under Guidelines § 2A. Thus, based on its selection of Guidelines § 2A1.4 as the most analogous guideline, the court declined to "group" petitioner's offenses under Guidelines § 3D1.2. As a result, petitioner's offense level rose to 19. Pet. App. A10-A12.

Approximately three months before sentencing, petitioner had filed for bankruptcy under Chapter 7 of the bankruptcy code. At sentencing, the court held two days of hearings on the question whether petitioner had the ability to pay a fine, and found that petitioner filed for bankruptcy as "a matter of expediency." Based on the financial relationship between petitioner and JAD Coal, the court considered JAD Coal's assets in determining whether petitioner had the ability to pay a fine. The court imposed a fine of $1,400,000, which it reduced by the amount of the civil

assessments already imposed against petitioner for a total fine of $1,078,713.20. Pet. App. A31-A33, A37.

4. The court of appeals affirmed. Pet. App. A1-A14. The court first rejected petitioner's contention that its conviction and sentence violated the Double Jeopardy Clause. The court concluded that 30 U.S.C. 820(a), the civil penalties provision, and 30 U.S.C. 820(d), the criminal provision, satisfied the *Blockburger* test for determining whether two statutes impose punishment for the "same offense" within the meaning of the Double Jeopardy Clause. See *Blockburger* v. *United States*, 284 U.S. 299 (1932). The court reasoned that Section 820(d) requires proof of an element, willfulness, not required by Section 820(a). Pet. App. A5-A6. In addition, the court held that the $300,000 civil assessment against petitioner was "reasonable and remedial" and thus "did not cross the line into the forbidden area of punishment." *Id.* at A7-A8. Because the civil sanction was "remedial in nature, * * * there [was] no violation of the double jeopardy clause." *Id.* at A8.

The court also held that the district court had not erred in sentencing petitioner. The court agreed with the district court that the involuntary manslaughter guideline provided the most analogous offense guideline to petitioner's offense and that petitioner's offenses should not be grouped under Guidelines § 3D1.2. The court also found that the district court had made sufficient findings of fact concerning petitioner's ability to pay. In so holding, the court rejected petitioner's contention that the district court should have determined whether there was sufficient evidence to pierce petitioner's corporate veil and hold JAD Coal liable for the fine. The court of appeals concluded that "Congress did not

intend for district courts to engage in such cumbersome proceedings as piercing a corporate veil before arriving at an appropriate fine or sentence. This is particularly true when a corporation, such as [petitioner], has been put into bankruptcy in an obvious effort to avoid payment of any fine." Pet. App. A13.

ARGUMENT

1. Petitioner renews its contention (Pet. 9-20) that its conviction and punishment in the criminal case violated the Double Jeopardy Clause. In particular, petitioner asserts that the civil assessments imposed by the federal mining authorities and subsequently reduced to judgment in the civil action against petitioner contained a "punitive component" and thus imposed punishment for the safety violations that later formed the basis for its conviction. While we believe that petitioner's double jeopardy claim does not warrant review, the Court may wish to hold the petition pending disposition of the government's petitions for a writ of certiorari in *United States* v. *Ursery*, No. 95-345 (filed Aug. 28, 1995), and *United States* v. *$405,089.23*, No. 95-346 (filed Aug. 28, 1995).

a. In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the "multiple punishments" component of the Double Jeopardy Clause bars imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. In explaining this conclusion, the Court stressed that the government "is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being

deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446. The *Halper* Court also cautioned that it was announcing "a rule for the rare case, the case such as the one before [it], where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Halper makes clear that a particular civil sanction following a criminal prosecution is not punitive under the Double Jeopardy Clause when it is reasonably calculated to make the government whole. As the *Halper* Court explained, a court confronting a claim that a civil sanction is punitive must determine the point at which "a civil sanction has accomplished its remedial purpose of making the Government whole [and] beyond which the sanction takes on the quality of punishment." 490 U.S. at 449. A sanction reaches that point only when it is not rationally related to the harm caused by the defendant's conduct or when it is "overwhelmingly disproportionate" to the damages caused. In *Halper*, for example, the defendant was subjected to a civil penalty of $130,000, which was "exponentially greater than the amount of the fraud [$585], and * * * also many times the amount of the Government's total loss [$16,000]." *Id.* at 445.

Petitioner's claim fails under *Halper* for a number of reasons. To begin with, the district court reduced petitioner's fine in the criminal case by the amount of the civil assessments. In *Halper*, after finding that the civil sanction imposed on the defendant was punitive, the Court remanded for further proceedings, suggesting that a second sanction would be barred only to the extent that it was punitive. *Halper*, 490 U.S. at 449-450, 452. Other decisions of this Court

support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See *Jones* v. *Thomas*, 491 U.S. 376, 380-387 (1989); *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986); compare *Ohio* v. *Johnson*, 467 U.S. 493, 499 (1984) (noting that when a defendant "is retried following conviction, the * * * protection [against multiple-punishments] ensures that after a subsequent conviction a defendant receives credit for time already served"). Here, at most, petitioner suffered a violation of the Double Jeopardy Clause only to the extent that the fine imposed in a criminal case was cumulative of the civil assessment. Because the district court reduced the fine by the amount of the assessment, the fine was not cumulative and did not violate the multiple punishments prong of the Double Jeopardy Clause.

Moreover, *Halper* holds that a civil assessment qualifies as punishment only if it is "overwhelmingly disproportionate" to the government's costs and damages. In this case, the government's investigation of the fatal mine collapse cost more than $160,000. The civil assessment of $300,000 is not overwhelmingly disproportionate to that amount. Indeed, *Halper* stated that the government may ordinarily seek liquidated damages plus double damages without imposing punishment in a civil proceeding. 490 U.S. at 446. The civil assessment in this case is less than twice the government's costs. See *United States* v. *Barnette*, 10 F.3d 1553 (11th Cir.) (civil damages of $50 million would not impose punishment on defendant when the government suffered at least $15 million in losses from the defendant's conduct), cert. denied, 115 S. Ct. 74 (1994); *United States* v. *Furlett*, 974 F.2d 839,

843-844 (7th Cir. 1992) ($75,000 fine not so disproportionate to the government's cost of investigating the defendants' fraud, even though the government submitted an affidavit that only outlined the number of hours involved in, and not the actual cost of the investigation).

Petitioner appears to concede that under *Halper*, the civil assessment did not constitute punishment if it bore a rational relation to the government's costs and damages. Petitioner asserts (Pet. 15-16), however, that when the government's costs and damages are known, a civil assessment that exceeds those costs is not remedial. The government's costs and damages were known or ascertainable in *Halper*, however, and that fact did not preclude the Court from stating that the government could seek to impose a civil assessment that was more than twice those costs and damages. In any event, petitioner ignores the fact that the conduct that caused the mine collapse continues to generate costs to the government, including those occasioned by petitioner's criminal prosecution, litigation traceable to petitioner's bankruptcy filing, and continuing efforts to collect the civil assessment, which petitioner has shown no intention of paying since that filing. Thus, even accepting petitioner's contention that a civil assessment cannot substantially exceed the government's known costs, petitioner is not entitled to relief.[1]

---

[1] Petitioner also argues (Pet. 16-20) that the court of appeals erred in finding that the criminal prosecution does not rest on the "same offense" as the prior civil assessment. We agree that the court of appeals appears to have erred in that respect. The court correctly noted that the criminal prosecution required proof of an element, willfulness, that the government was not required to prove to impose the civil assessment. That

b. Petitioner also asserts (Pet. 12-14) that the court of appeals' decision conflicts with *United States* v. *Hudson*, 14 F.3d 536 (10th Cir. 1994), and *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), petition for cert. pending, No. 95-346 (filed Aug. 28, 1995). Neither decision conflicts with the court of appeals' rejection of petitioner's double jeopardy claim. In *Hudson*, the Tenth Circuit simply remanded for the district court to determine whether a monetary assessment imposed by an administrative agency was remedial under the *Halper* test. In *$405,089.23*, the Ninth Circuit held that a forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) always constitutes punishment, but it did not purport to reject the *Halper* proportionality analysis for other kinds of civil sanctions.

Petitioner suggests (Pet. 6, 12) that this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which determined that certain civil forfeitures amount to "punishment" for purposes of the Excessive Fines Clause of the Eighth Amendment, calls for a different analysis of the double jeopardy question, as the Ninth Circuit concluded in *$405,089.23*, *supra*. It is doubtful that if *Austin* were so read it would have any application outside the context of sanctions imposed under civil forfeiture statutes, which the *Austin* Court viewed as having a unique history and function. See 113 S. Ct. at 2806-2812. Nonetheless,

---

additional mental element, however, does not make the civil violation a different "offense" if all of its elements are included in the criminal violation. See, *e.g.*, *Brown* v. *Ohio*, 432 U.S. 161, 167-168 (1977); cf. *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Because the validity of petitioner's conviction is not affected by the court of appeals' error, further review of the "same offense" determination is not warranted.

the extent (if any) to which *Austin* should be read to change established double jeopardy doctrine with respect to civil forfeitures is before the Court in *$405,089.23*, *supra*, and *Ursery*, *supra*, and the Court's resolution of that question might affect the proper disposition of the petition in this case. For that reason, the Court may wish to hold the petition in this case pending its disposition of the government's petitions in *$405,089.23*, *supra*, and *Ursery*, *supra*.

2. Petitioner next contends (Pet. 20-27) that the district court failed to make findings adequate to support its imposition of a $1,078,713 fine on petitioner. In particular, petitioner asserts that the court failed to justify its decision to consider the assets of a related corporation, JAD Coal, in determining whether petitioner had the ability to pay a fine. That fact-bound claim does not warrant review.

Federal Rule of Criminal Procedure 32(c)(1) requires the district court at sentencing to "rule on any unresolved objections to the presentence report. * * * For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."[2] Here, petitioner claimed that it lacked the ability to pay a fine. The district court held two days of hearings at which, as petitioner acknowledges (Pet. 22), "the prosecution put on extensive evidence" of JAD Coal's relationship with petitioner as it affected petitioner's ability to

---

[2] Petitioner relies (Pet. 20; Pet. App. A54) on a version of Rule 32 that was superseded on November 1, 1987. Although the Rule has been reorganized, however, its substance has not materially changed in any way relevant to this case.

pay a fine. After that hearing, the district court rejected petitioner's contention. Specifically, the court noted that petitioner had filed for bankruptcy as "a matter of expediency," that "substantial funds were pumped into [petitioner] by JAD," and that the principals of JAD Coal and petitioner "are substantially the same." Then, "based upon all the facts in the case," the court held that there was "no basis for imposing a fine of less than $1.4 million." In short, as the court of appeals held, "[t]he findings of the district court were sufficiently specific on the issue of [petitioner's] ability to pay the fine and the connection between [petitioner] and JAD to comply with" Rule 32.[3]

3. Finally, petitioner asserts (Pet. 28-29) that the district court erred in declining to "group" its offenses under the Sentencing Guidelines. Petitioner

---

[3] Petitioner also asserts that "[i]t defies fundamental concepts of fairness and due process for the trial court to assess *J&T's* fine based on *JAD's* assets," and that "there is no evidence of record that [petitioner] could possibly pay" the fine. Pet. 25. Those contentions overlook fundamental principles of federal sentencing law. First, it is the *defendant's* burden to prove inability to pay a fine. See, *e.g.*, *United States* v. *Gomez*, 24 F.3d 924, 926-927 (7th Cir.), cert. denied, 115 S. Ct. 280 (1994). Petitioner failed to persuade the trier of fact on an issue on which it carried the burden of persuasion. Second, there is nothing unfair in the district court's consideration of resources that may be available to a closely-held company from related companies or individuals. If the shoe were on the other foot, a corporate defendant in petitioner's position could demand credit toward its fine for any criminal fines already paid by its shareholders, even in the absence of an alter-ego relationship. See Guidelines § 8C3.4, Background Note (providing for credit based on the presumption that "[f]or practical purposes, most closely held organizations are the alter egos of their owner-managers").

does not appear to contest, however, the district court's determination that there is no sentencing guideline for its offense of conviction or the court's selection of Guidelines § 2A1.4 as the guideline for the offense most analogous to the offense of conviction. Guidelines § 3D1.2, which governs the "grouping" of offenses, expressly provides that "all offenses under Chapter Two, Part A" of the Guidelines should not be grouped. There is accordingly no merit to petitioner's claim.[4] In any event, even if petitioner were correct in its submission that the lower courts need further guidance on the proper application of the grouping Guidelines, that would be a matter for the Sentencing Commission, not this Court. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

---

[4] Petitioner also contends that the district court erred in adding five levels, instead of three, to its offense level even if that court was correct in declining to group the offenses. Petitioner did not raise that claim in the district court, see Gov't C.A. Br. 24, and the court of appeals did not discuss it. Because the court of appeals chose not to overlook petitioner's default in the district court by passing on that claim, it is not appropriately before this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 42-43 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, with respect to the first question presented in the petition, the petition for a writ of certiorari should be held pending the disposition of the petitions for a writ of certiorari in *United States* v. *$405,089.23*, No. 95-346 (filed Aug. 28, 1995), and *United States* v. *Ursery*, No. 95-345 (filed Aug. 28, 1995).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

DECEMBER 1995